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Utah Court of Appeals

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IN THE COURT OF APPEALS
OF THE STATE OF UTAH

HAYNES LAND & LIVESTOCK
COMPANY, a partnership,

Plaintiff-Appellant,

vs.

JACOB FAMILY CHALK CREEK, LLC,
a limited liability company; et al.,

Defendants-Appellees.

Case No. 20080858-CA

BRIEF OF CROSS-APPELLEE
CHALK CREEK-HOYSTVILLE WATER USERS CORPORATION

APPEAL FROM THE FINAL DECREE
OF THE FOURTH JUDICIAL DISTRICT COURT OF SUMMIT COUNTY,
THE HONORABLE BRUCE C. LUBECK, DISTRICT JUDGE

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Water Users Corporation*

UTAH APPELLATE COURTS

OCT 08 2009

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Case No. 20080858-CA

BRIEF OF CROSS-APPELLEE
CHALK CREEK-HOYSTVILLE WATER USERS CORPORATION

JURISDICTIONAL STATEMENT ON CROSS-APPEAL¹

The Order and Final Judgment was entered September 16, 2008.² The Notice of Appeal was timely filed on October 14, 2008;³ an Amended Notice of Appeal (eliminating

¹The trial court record consists of papers from two cases that were ultimately consolidated, but the papers in each case were indexed separately for appeal. Papers from *Haynes Land & Livestock Co. v. Jacob Family Chalk Creek*, trial court case no. 980600244, will be cited as “R-Haynes.” Papers from *Triple H Ranch, LC v. Boyer*, trial court case no. 000600299, will be cited as “R-TripleH.”

²R-Haynes 1693-1700.

³R-Haynes 1701-1705.

Chalk Creek-Hoytsville Water Users Corporation as an appellant) was filed October 16, 2008.⁴ Boyers⁵ and Jacobs⁶ each filed their Notice of Cross-Appeal on October 17, 2008.

The Order and Final Judgment contained a certification of finality under Rule 54(b) of the Utah Rules of Civil Procedure.⁷ A claim for partition by Triple H Ranch, LC against Fern Boyer, Gerald Boyer, Gregory Boyer, J.S. Hansen, and Alfred C. Blonquist remains pending before the trial court.

Jurisdiction was conferred on the Utah Supreme Court by Utah Code § 78A-3-102(3)(j). This Court has pour-over jurisdiction under Utah Code § 78A-4-103(2)(j).

ISSUES PRESENTED FOR REVIEW ON CROSS-APPEAL

1. Where the roads in question did not appear on maps of the period, there was no evidence of a definite path of travel, and no proof that travelers lacked express or implied permission, did evidence that some people arrived at that destination compel a finding, under the clear and convincing standard, that a definite road existed to that destination and had been used continuously without permission by members of the public for ten years?

Standard of review:

The standard of review in road dedication cases was recently summarized as follows:

An appellate court reviews a trial court's legal interpretation of the Dedication Statute for correctness and its factual findings for

⁴R-Haynes 1711-1715.

⁵R-Haynes 1716-20.

⁶R-Haynes 1721-25.

⁷R-Haynes 1697.

clear error. But whether the facts of a case satisfy the requirements of the Dedication Statute is a mixed question of fact and law that involves various and complex facts, evidentiary resolutions, and credibility determinations. Thus, an appellate court reviews a trial court's decision regarding whether a public highway has been established under the Dedication Statute for correctness but grants the court significant discretion in its application of the facts to the statute.⁸

In applying this standard, however, it must be remembered that (1) the Boyers and Jacobs on cross-appeal really seek not to overturn a finding, but to compel a finding on an issue where the trial court has “significant discretion in its application of the facts to the statute”⁹ and (2) the trial court could have made the requested finding only if the evidence were clear and convincing.¹⁰ These factors are addressed below.

The general standard for compelling a finding is as follows:

Inasmuch as under the issues as hereinabove recited, the burden of proving its defense was upon the defendant, we would not reverse and compel a finding in accordance with that contention unless the evidence were such that all reasonable minds would necessarily so find. Conversely, if there is a reasonable basis in the evidence, or from lack of evidence, upon which reasonable minds could remain unconvinced, we would not disturb the ruling of the trial court.¹¹

⁸*Wasatch County v. Okelberry*, 2008 UT 10, ¶ 8, 179 P.3d 768, 772.

⁹*Id.*

¹⁰*Id.* at ¶ 9, 179 P.3d at 773.

¹¹*Centurian Corp. v. Fiberchem, Inc.*, 562 P.2d 1252, 1253 (Utah 1977). *Accord Groen v. Tri-O-Inc.*, 667 P.2d 598, 603 (Utah 1983).

Moreover, where the standard of proof was clear and convincing evidence, the presumption on appeal against compelling a finding should be even more deferential to the ruling of the trial court.¹²

In challenging the decision of the trial court, the cross-appellants were required to marshal the evidence supporting that decision:

When parties appeal a court's fact-sensitive use of its discretionary powers, they must successfully challenge the factual findings upon which the trial court's decision depended. This requires that parties marshal the evidence. As we have previously explained, parties who ask this court to consider fact-sensitive questions--including those questions reviewed under an abuse of discretion standard--have a duty to marshal all the evidence that formed the basis for the trial court's ruling.¹³

Preservation below: The Water Users do not disagree with the statement of Jacobs and Boyers that this issue was raised below.

2. Where the trial focused on a loop road and the parties presented evidence concerning all segments of the road, did the court err in determining the rights of all the parties in each segment of the road even though some parties had not specifically requested that relief?

Standard of review: No Utah case specifically sets the standard for review of a decision under Rule 54(c). This Court should apply the same standard as determinations

¹²See *Nikols v. Goodman & Chesnoff*, 2009 Ut App 79, ¶¶ 7, 11, 206 P.3d 295; *In re Estate of Hock*, 655 P.2d 1111, 1115 n. 1 (Utah 1982).

¹³*United Park City Mines Co. v. Stichting Mayflower Mt. Fonds*, 2006 UT 35, ¶ 38, 140 P.3d 1200, 1208-09 (citations and quotation marks omitted).

under Rule 15(b), reviewing the trial court's application of the rule for correctness but according broad discretion in determining whether the issue was within the scope of matters decided in the case.¹⁴

Preservation below: The Water Users do not disagree with the statement of Jacobs and Boyers that this issue was raised below.

DETERMINATIVE PROVISIONS OF LAW ON CROSS-APPEAL

Utah Code § 72-5-104(1) (2006): "A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

Utah R. Civ. P. 54(c)(1):

(c) Demand for judgment.

(c)(1) Generally. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. It may be given for or against one or more of several claimants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between or among themselves.

¹⁴See *Keller v. Southwood North Medical Pavilion, Inc.*, 959 P.2d 102, 105 (Utah 1998).

STATEMENT OF THE CASE ON CROSS-APPEAL

Chalk Creek-Hoystville Water Users Corporation (“Water Users”) incorporates the Statement of the Case on Cross-Appeal from the Reply Brief of Appellant and Brief of Cross-Appellee (Haynes Parties). Additional statements regarding the evidence are presented in connection with the argument below.

SUMMARY OF ARGUMENT

The trial court fixed the end points of the Middle Fork Road and the East Fork Road at the points shown on the maps of the period. To challenge that finding, the defendants were required to marshal all the evidence and show that no was no evidence to support the finding, and were further required to show evidence that would compel a finding, by clear and convincing evidence, that public non-permissive use had created a road in a definite location. The maps themselves support the trial court’s decision. In addition, there was substantial testimony that no road existed beyond the points found by the trial court.

The determination that the Water Users have a prescriptive easement across the Boyer property, although not raised in the pleadings, was within the scope of the trial court’s effort to determine all the rights in the subject road. Further, any error was harmless because the Water Users have express easements over the roads.

ARGUMENT

I: THERE WAS NO CLEAR AND CONVINCING EVIDENCE COMPELLING A FINDING THAT THE MIDDLE FORK ROAD EXTENDED TO THE BOYER PROPERTY.

There was evidence that some of the people who traveled the Middle Fork Road did so to reach the “Blue Lakes,” which apparently include Boyer Lake, Joyce Lake, Blue Lake, and perhaps other lakes. The trial court found the Middle Fork Road extended only to a point a significant distance from Boyer Lake. Although maps of the period show no road going to any one of the lakes, Boyers now ask this Court to hold that the evidence was clear and convincing as a matter of law that the persons who traveled the road must have gone to Boyer Lake (rather than Blue Lake or Joyce Lake or some other destination) and that they must have followed the same path as the current road. In making this argument, Boyers fail to understand the unique requirements of an R.S. 2477¹⁵ public road claim.¹⁶

Most of the road Boyers address is in section 34, Township 2 North, Range 8 East. During the critical time frame of 1880 to 1896, this road was owned by the federal government. Any claim of a public road therefore must meet the requirements of R.S. 2477.

¹⁵Mining Act of 1866, ch. 262, § 8, 14 Stat. 251, 253 (1866), repealed by Federal Lands Policy Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1761-71).

¹⁶Although the Water Users chose to not appeal directly from the trial court’s finding that the Middle Fork Road and other roads were public, they support and agree with the position of the Haynes parties, set forth in the Opening Brief of Appellants (Haynes Parties), that none of the roads at issue are public.

That section states: “The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”

R.S. 2477 did not grant the public an easement to traverse land wherever convenient, but rather granted the right to “construct” a road. Actual mechanical construction may not be required,¹⁷ but there must still be some use that results in an actual, physical road. The “way must have a particular definite line; the grantee does not have the right to go at random over any and all parts of the servient estate.”¹⁸ Thus, several courts have rejected road claims where there were several lines of travel, all converging to a common point.¹⁹ In *Dahl v. Roach*,²⁰ the Utah Supreme Court rejected a claim of public road in part because the evidence did not show that the public “were confined to any particular strip or portion” of the land.²¹

¹⁷*Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 779-81 (10th Cir. 2005).

¹⁸25 Am Jur 2d Easements and Licenses in Real Property § 64.

¹⁹*Gentleman v. Soule*, 32 Ill. 271, 278 (1863) (several roads led to a ford on a river); *Dooling v. Dabel*, 186 P.2d 183, 187 (Cal. Ct. App. 1947) (users did not acquire a right of way by prescription, because they did not follow one definite path or course, but traveled over the land in various courses or directions); *Gibson v. Buice*, 394 So. 2d 451, 452 (Fla. App. 1981) (“a prescriptive right-of-way cannot be acquired to pass over a tract of land generally but must be confined to a reasonably definite line and limited to the extent of the actual use. [T]o claim a prescriptive easement, one must allege and prove its route, termini and width.”); *Manchester v. Blaess*, 258 Mich. 652, 654-56, 242 N.W. 798, 799 (1932) (the village had not acquired a prescriptive right to drive or park on the owner’s land because there was no specific driveway or definite line that had been used as the right of way).

²⁰76 Utah 74, 287 P. 622 (1930).

²¹*Id.* at 78, 287 P. at 623.

Boyers argue that “the relocation of a road that does not substantially affect the general course of a highway does not alter its public status.”²² Boyers cite to two Utah decisions in support of this claim, but neither is on point. In *Memmott v. Anderson*,²³ the issue was whether an adjoining landowner could object to the relocation of an existing public road. There is no discussion of whether relocation of the path of travel during the prescriptive period affects the initial creation of the road. In *Lindsay Land & Live Stock Co. v. Churnos*,²⁴ the evidence also showed an established road, although the location had been changed slightly:

There was evidence that the travel over the road did not always follow an identical or uniform line, but at times and in a few places varied somewhat therefrom, and that sheep when trailing across would sometimes depart from the line of the road. There was ample positive evidence, however, that the road as described by the findings and decree was substantially the line and course of the road as it had been traveled and used for more than fifty years.²⁵

Here, in contrast, there simply was no clear and convincing evidence of an established road. Had Boyers marshaled the evidence, they would have been required to show that Gary Boyer testified that the area at the end of the established road is a gently sloping valley, and users could have taken any route they chose.²⁶ Chuck Horman noted that the road didn’t

²²Boyers’ brief at 23.

²³642 P.2d 750 (Utah 1982).

²⁴75 Utah 384, 285 P. 646 (1929).

²⁵*Id.* at 388, 285 P. at 648.

²⁶Transcript vol. II, p. 376.

show on old maps, was only recently created, and had been frequently locked.²⁷ Also, the evidence that an individual went to “the Blue Lakes” could mean that the person went to “Blue Lake” and not to either Joyce Lake or Boyer Lake.

The holding of *Lindsay Land & Live Stock Co.* shows that a definite path is essential:

With respect to the certainty of the line or course of the road, the evidence was also sufficient to support the decree. While the public cannot acquire a right by use to pass over a tract of land generally, but only in a certain line or way, it is not indispensable to the acquisition of the right that there should be no deviation in the use from a direct line of travel. If the travel has remained substantially unchanged, and the practical identity of the road preserved, it is sufficient, although there may have been slight deviations from the common way to avoid encroachments, obstacles, or obstructions upon the road.²⁸

This confirms that “the public cannot acquire a right by use to pass over a tract of land generally.” Here, there was no evidence that the “travel has remained substantially unchanged” or that “the practical identity of the road preserved,” because there was no road or common way. Boyers’ claim for a public road, based on passage over a tract of land generally and not over a definite road, must be rejected.

II: THE TRIAL COURT PROPERLY DETERMINED THE RIGHTS OF THE WATER COMPANY AS PART OF THE COURT’S DETERMINATION OF RIGHTS TO EACH SEGMENT OF THE ROAD.

The Water Users acknowledge their pleadings do not expressly claim an easement over the Boyer property. But, Rule 54(c) of the Utah Rules of Civil Procedure clearly

²⁷Transcript vol. I, pp. 251-52.

²⁸*Lindsay Land & Live Stock Co. v. Churnos*, 75 Utah at 391-92, 285 P. at 649.

provides that “every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.” Cases interpreting this section confirm “the rules allow examination into and settlement of all issues bearing upon the controversy, with latitude for proof that extends beyond the pleadings, where appropriate.”²⁹ “[I]t could not be made plainer that the underlying purpose of the rules is that judgment should be granted in accordance with the law and the evidence as the ends of justice require[.]”³⁰

Boyers do not claim that the result reached by the trial court was unfair or contrary to fact, only that it was not pleaded. The courts have rejected claims based on improper pleading where the party “did not claim that it was prejudiced”³¹ or show that it had additional evidence to present on the subject.³²

The presentations of the parties placed in issue all rights of the parties to the loop road. The trial court’s decision shows the court made an effort to determine the rights of each party in each segment of the road.³³ There is evidence to support the trial court’s determination. Dennis Wright testified to traveling over the roads beginning in the early

²⁹*Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1374 (Utah 1996) (citation and quotation marks omitted).

³⁰*First Security Bank of Utah, N.A. v. Colonial Ford, Inc.*, 597 P.2d 859, 861 (Utah 1979).

³¹*Jones, Waldo, Holbrook & McDonough v. Dawson*, 923 P.2d at 1374.

³²*See Hill v. Allred*, 2009 UT 28, ¶ 48.

³³*See generally* R-Haynes 1695-99.

1950s with his grandfather to inspect the reservoir.³⁴ He further testified that as the current water master he travels to the reservoir many times in the springtime and at least once each week during the summer.³⁵ There was no evidence that this regular use was ever interrupted.

Boyers have not shown any prejudice or that the decision of the trial court was somehow factually incorrect. The evidence also shows that the Water Users had an express easement over the Middle Fork Road³⁶ and condemned a way over the East Fork Road.³⁷

Where the pleadings and evidence put the rights along the entire loop road at issue, it was proper for the trial court to determine the rights of the Water Users in the loop road. The judgment reflecting that the Water Users have a prescriptive easement over the Boyer property should be affirmed.

III: THERE WAS NO COMPELLING, CLEAR AND CONVINCING EVIDENCE OF A PUBLIC ROAD ON THE EAST FORK.

The Water Users adopt and incorporate herein the arguments set forth in Point IV of the brief on cross-appeal filed by the Haynes parties.

CONCLUSION

There was no clear and convincing evidence that the East Fork Road was continuously used by members of the public for any ten year period. Similarly, the Water Users agree with the position of the Haynes parties that none of the subject roads had become public and that

³⁴Transcript vol. IV, p. 837.

³⁵*Id.* p. 838-39.

³⁶Plaintiff's exh. 6.


³⁷Transcript vol. III, pp. 673-74.

any use by members of the public was permissive given the wild, unenclosed nature of the land at time. In the event this Court affirms the trial court's ruling that portions of the road are public, this Court should also affirm the trial court's ruling that the East Fork Road did not extend past the midpoint of Section 8 (T2N R8E), and that the Middle Fork Road did not extend past Section 4 (T1N R8E). The ruling that there was no public road past those point is supported by the maps of the period and by other evidence and should be affirmed.

The trial court's finding that the Water Users have a prescriptive easement over the Boyer property was within the scope of issues tried, and was harmless in any event. It should be affirmed.

DATED this 8th day of October, 2009.

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MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing were mailed to each of the following, postage prepaid, this 8th day of October, 2009.

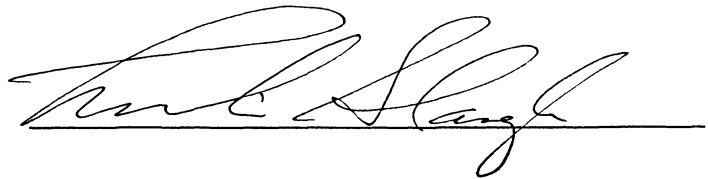
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A handwritten signature in dark ink, appearing to read "Paul H. Smith", is written over a horizontal line.